UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 12

G4S SECURE SOLUTIONS (USA) Inc.
Respondent Employer

-and- **Case 12-RC-203988**

INTERNATIONAL UNION, SECURITY, POLICE & FIRE PROFESSIONALS OF AMERICA (SPFPA)
Petitioner

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SPFPA Statement in Opposition to Employer's Request for Review in Case No. 12-RC-293988

The International Union, Security, Police, and Fire Professionals of America, (SPFPA) submits this Statement in Opposition to a Request for Review (Request) by G4-S Security Solutions (Employer) of a Regional Director's determination that the Employer failed to establish by a preponderance of evidence that twenty-four (24) of its employees, termed "lieutenants," employed at the Turkey Point nuclear facility in Florida City, Florida meet the definition of supervisor established by Section 2(11) of the National Labor Relations Act (Act).

Review of the Employer's Request is inappropriate because the Request fails to comply with multiple procedural requirements of Board Rule No. 102.67(c) and because the Regional Director's Decision was not clearly erroneous as to a substantial factual issue.

SUBJECT INDEX

PROCEDURAL HISTORY

Petitioner International Union, Security, Police and Fire Professionals of America (SPFPA) sought to represent a bargaining unit of "all full-time and regular part-time field supervisors (lieutenants)" and captains employed by the Employer at the Turkey Point nuclear facility.

The Employer challenged the propriety of this unit as consisting of supervisors as defined by Section 2(11) of the Act. After a hearing into this matter, the Regional Director decided captains are Section 2(11) supervisors, but that lieutenants are not. Accordingly, the Regional Director directed an election to be held among lieutenants on November 1 and November 2, 2017. The election resulted in a unanimous victory for SPFPA.

On November 14, 2017, the Employer filed a Request for Review of the Regional Director's decision pursuant to Board Rule 102.67.

This Request for Review represents essentially the Employer's third bite at the apple. In two prior decisions, the Employer failed to meet its burden of proof in cases where the supervisory status of the lieutenants was at issue. Those cases are *The Wackenhut Corporation* 345 NLRB 850 (2005), *G4S Regulated Security Solutions*, 358 NLRB 1701 (2012), 359 NLRB 947 (2013), 362 NLRB 1 (2015) and *G4S Regulated Security Solutions v NLRB*, 11th Cir. Case No. 15-13224 (2016) (unpublished). For the reasons explained below, it fares no better here.

STANDARD OF REVIEW

The Regional Director's Decision is subject to the clearly erroneous standard of review. Such standard can be met even where the Regional Director arguably reached a conclusion in error. Such error must be *clear* in order to warrant Review.

It is the Employer that bears the burden to establish Section 2(11) supervisor status by a preponderance of detailed and specific evidence. *See NLRB v. Kentucky River Community Care, Inc.*, 532 706, 711-13 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Conflicting record evidence does not support a finding of Section (11) status. *Phelps Community Medical Center*, 295 N.L.R.B. 486, 490 (1989)(setting aside Regional Director's finding of Section 2(11) status where the record contained "evidence ... in conflict or otherwise inconclusive" as to indicia of Section 2(11) status identified by the employer); *G4S Regulated Security Solutions*, 362 NLRB 134 (2015).

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DISCUSSION

I. The Employer's Request Fails to Comply with Multiple Procedural Provisions of Board Rule 102.67, Warranting Dismissal

The Employer's Request fails to comply with many of the procedural requirements of Board Rule 102.67, which provides for request of review of a Regional Director's Decision & Direction of Election (DDE). Dismissal is warranted for these reasons alone.

Board Rule 102.67(b) states: "A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction ... *Provided, however*, That [sic] within 14 days after service thereof any party may file a request for review with the Board in Washington, DC."

The Regional Director in this case issued his decision on October 17 resulting in a filing deadline of November 1. By its November 14 filing, the Employer has missed the deadline by approximately twice the permitted filing period, warranting dismissal. This is true notwithstanding the statement by the Regional Director that:

> Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be field with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirement of Section 102.67 of the Board's Rules and Regulations.

First, the excerpt is correctly bookended by statements that the request for review must comply with Section 102.67, which the Employer failed to do here.

Second, the Petitioner does not here contend that, contrary to the Regional Director, the Employer's failure to file a Request for Review before the election conducted by the Board on November 1 and November 2 necessarily precludes the Employer from requesting review of the decision.

The untimeliness of the filing precludes review, not the fact that it failed to precede the election. If, for example the election had been held on October 28, a permissible date under Board Rules, and the Petitioner had filed its request on October 31, the filing would be timely. Not so here.

The Employer's request also fails to comply with Section 102.67(i), which requires a "subject index" where the request for review exceeds twenty (20) pages, which requirement applies here, given that the Employer's Request is forty-nine (49) pages in length.

The section of the Employer's Request titled "Table of Contents," is not a "subject index." The headings do not summarize the contents of the Employer's brief but instead misstate them outright. The headings are simply large excerpts from the Regional Director's Decision, whose conclusions the Employer obviously does not echo but affirmatively disputes. Therefore, this so-called "Table of Contents" misleads the Board and, by its carelessly excessive length, does not advance the clear purpose of Section 102.67(k): to allow the Board to quickly and efficiently determine and locate the *actual* contents of a party's brief.

The Employer's Request also fails to comply with Section 102.67(d), which states "Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity or [sic] recourse to the record[.]" The Employer's Request includes copious reference to, and sweeping extracts from, the hearing transcript.

By this copious reference, the transcript is a necessary part of the Request. However, the version offered as "Attachment B" in the Request for Review is incomplete, with approximately half of all transcript pages missing. This is particularly remarkable given that the Employer takes issue in its own brief with the Regional Director's alleged failure to include sufficient citations to the transcript.

Accordingly, the Request is not self-contained and does not enable the Board to rule on the basis of the content of the Request alone. For this additional reason, dismissal is warranted here.

II. The Regional Director's Decision was not "Clearly Erroneous," making Board Review Inappropriate under Section 102.67(c)(2)

An employee has Section 2(11) supervisory status where an employer shows by detailed and specific evidence that an employee has authority, through the exercise of independent judgement to perform one or more of the supervisory tasks enumerated by Section 2(11), and where the employee performs such tasks with sufficient frequency and regularity. As alleged by the Employer, the relevant Section 2(11) tasks here are disciplining, assigning, responsibly directing, and hiring employees.

To possess independent judgement, employees must "act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692-93 (2006). Accordingly, "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* at 693.

A. Lieutenants were not Section 2(11) Supervisors by their Involvement in Mechanically Administering Disciplinary Policies

The Regional Director was correct, or in any event not clearly erroneous, in finding that the Employer failed to show by a preponderance of detailed and specific evidence that Lieutenants possessed discretionary disciplinary authority. DDE at 12.

i. The Regional Director Correctly found that Lieutenants Lacked Disciplinary Authority

The Employer contends that authority to discipline was shown by disciplinary notices bearing the signatures of Lieutenants, testimony from Director Scott and Captain Bonnell, a four-year-old piece of discipline "issued by" Manager Scott, and coachings. The Regional Director correctly rejected this contention, both in reliance on more reliable evidence and in recognition of deficiencies in the Employer's evidence.

First, the Regional Director relied on the Board's earlier determination in *G4S Regulated Security Solutions,* 362 NLRB 134 (2015) *enfd.* 670 Fed. Appx. 697 (11th Cir. 2016) that "employees ranking immediately above security officers in [the] chain of command at Turkey Point were [not] statutory supervisors." The Employer apparently concedes the continued applicability of *G4S Regulated Security Solutions*, since it does not contest the Regional Director's reliance upon it in his Decision.

Second, the Regional Director relied on a series of three (3) communications sent on January 29, 2016, June 13, 2016, and July 1, 2016 from the Employer to its Captains. These communications all stated that Lieutenants had failed to exercise disciplinary authority within the meaning of Section 2(11) and that this needed to change to prohibit the Lieutenants from benefiting from the protections of the Act.

The Employer attempts to negate its 2016 admissions by trading on the possibility that the *group* failure to exercise disciplinary authority referenced in the Employer communications does not exclude the possibility that at least some Lieutenants did in fact issue discipline. The problem for the Employer, though, is that there is no record evidence that this possibility was in fact a reality, which evidence the Employer must produce, because it bears the burden to show Section 2(11) status.

Third, the Regional Director relied on testimony from Lieutenant Tai that officers lack disciplinary authority and instead must "bubble up" the decision of whether to discipline to Director Mareth and Manager Scott. This testimony as to lack of authority was confirmed by Director Mareth's own testimony and his statement in a communication dated June 13, 2016 that Lieutenants were unable to discipline security officers until a Captain had completed a "quality record review." Likewise, the Performance Improvement Plan (PIP) issued against Captain Evans on July 20, 2017 stated "captains are responsible for informing lieutenants about attendance infractions in the first instance, thereby initially prompting the lieutenants to create attendance disciplines." DDE at 30.

The Regional Director gave little weight to Manager Scott's and Captain Bonnell's testimony that they had disciplinary authority in their former Lieutenant positions, since such testimony was about events remote in time from the hearing. DDE at 31. It is not clearly erroneous for the Regional Director to give greater weight to testimonial evidence confirmed by additional pieces documentary evidence, where all this evidence concerned events closer in time than Manager Scott's and Captain Bonnell's testimony.

Even assuming that Manager Scott's and Captain Bonnell's testimony is somehow entitled to equal weight, the Board has stated that an Employer fails to bear its burden to show Section 2(11) status where relevant record evidence is in conflict or inconclusive, as here. *See e.g., Phelps Community Medical Center*, 295 NLRB at 490.

Fourth, the Regional Director relied on testimony from Manager Scott that the signature by Lieutenants of the six work performance disciplinary notices and two coachings in the record did not necessarily show that the signing Lieutenant "actually independently investigated the matter or issued it without seeking guidance for a captain or other superior manager." DDE at 30. Moreover, two of the disciplinary notices, by their plain terms, stated that they involved the intervention and investigation of Captains and/or "superior management." DDE at 16-17.

The Employer admits that while Manager Scott's testimony as to the lack of necessary involvement of Lieutenants in discipline is "true on its face," it should not be accepted, because "there is no reason to believe that none of those disciplinary notices were issued independently by the listed lieutenant." The recurring problem for the Employer, however, is that it had to bear the burden of coming forward with affirmative evidence giving the Regional Director a reason to so believe. It did not. Raising the metaphysical possibility that some signatures fall outside Manager Scott's testimony does not cure this deficiency.

Lastly, the Regional Director correctly concluded that Lieutenants' authority to issue coachings differs from an authority to issue discipline. As noted by the Regional Director, coachings and the Employer's Progressive Discipline Policy both clearly state that coachings are non-disciplinary. DDE at 31.

Assuming arguendo that the coachings and Policy do not mean what they say and further inquiry is required, the Regional Director also correctly concluded that the facts of the *Oak Park Nursing* decision, relied upon by the Employer, do not reach the facts of this case. 351 NLRB 27 (2007).

In *Oak Park Nursing*, the Board stated that an employee has disciplinary authority where she can issue coachings that lay the foundation for future discipline. Such foundation was present in *Oakwood Nursing* because the record contained evidence that two employees had in fact been disciplined as a result of a process put in motion by a coaching. In that same decision, the Board suggested that whether a coaching lays the foundation for discipline also depends on whether coachings are a prerequisite to discipline or routinely result in discipline.

None of these conditions are present here. Unlike in *Oakwood Nursing*, there is not a scintilla of evidence that an employee has actually been disciplined as the result of a process put in motion by a coaching. As the result of questioning leading them away from their initial statement that coachings do not result in discipline, Captains Bonnell and Campbell testified that, at a maximum, coachings may possibly inform a later decision to discipline. Tr. 147; Tr. 216. This type of "evidence," is in keeping with the Employer's other attempts elsewhere in its brief to argue by raising a metaphysical possibility.

For these reasons, it was correct and not clearly erroneous for the Regional Director to conclude that the Employer failed to show by a preponderance that Lieutenants possess disciplinary authority by their involvement in non-attendance discipline and coachings.

ii. The Regional Director Correctly found that Lieutenants Lacked Independent Judgment in Discipline

Assuming arguendo that the Regional Director was clearly erroneous as to whether Lieutenants possessed disciplinary authority, he was nonetheless correct in determining that Lieutenants lacked independent judgement when issuing coachings and discipline. Instead, only mechanistic application of pre-existing policies was involved. Independent judgment instead rested with Captains and/or superior management

In reaching his conclusion, the Regional Director relied on Employer communications "mak[ing] it clear that the Employer's policies … have not changed since the Board issued its decision in *G4S Regulated Security Solutions* in 2015, noting that lieutenants had been instructed to get a captain's review before issuing discipline." DDE at 32. He also relied a PIP and witness testimony stating that Captains "provide guidance to lieutenants to make sure that they are issuing the correct level of warning." DDE. at 30-32. Under these circumstances, Lieutenants are at most a conduit to transmit decisions reached by Captains or others higher in the organizational hierarchy. It is not clearly erroneous to conclude on this basis that Lieutenants lack independent judgment.

This conclusion was bolstered by the Regional Director's view that the application of discipline proceeds according to a a highly detailed Attendance Policy and Progressive Discipline Policy. DDE at 30-32.

The Employer's attack on the Regional Director's decision relating to the written policies falls flat. The Employer cites *Oakwood Healthcare* for the notion that "the mere existence of company policies does not eliminate independent judgment from decisions-making if the parties allow for discretionary choices." 348 NLRB at 693. The "company policies" at issue here do not allow for discretionary choices.

The Attendance Policy "defines each type of infraction and specifies the penalties for each infraction of the same type within a rolling 12 month period" and requires the consideration of mitigating factors to the independent judgement not of Lieutenants, but the Project Manager. DDE at 11-12.

The Employer's Progressive Discipline Policy is eight pages long, contains a detailed matrix for determining the quantum of discipline appropriate for a given "Level" of offense, which Levels are defined as including literally dozens of specific offenses. Nothing in the Policy states that Lieutenants are to reason by analogy, compare data, or make any of the other determinations involved in an exercise of independent discretion. Instead, the Policy states: "When it is not practical to follow these guidelines or if an unlisted event occurs, the Project Manager will consult with Regulated Security Solutions for guidance."

In other words, when the Policy does not dictate a result, even those individuals near the peak of the organizational hierarchy lack independent judgment and instead must refer the matter elsewhere. *A fortiori*, Lieutenants, who are much lower on the hierarchy, lack independent judgement when administering the Policy.

This conclusion may be at odds with certain testimony by Project Manager Scott that Lieutenants did exercise independent judgement, but it is not clearly erroneous to find a lack of independent judgement. Project Manager Scott's testimony is not substantiated by other record testimony while the policies' statement as to independent judgement is substantiated by the testimony of Director Mareth, the Employer's 2016 communications admitting a lack of independent judgment among Lieutenants and exorting that such be corrected, and a Performance Improvement Plan (PIP) confirming that as late as July 2017, at least Captain Evans failed to shift independent judgment and authority onto Lieutenants at the very least, the record is inconclusive. *Phelps Community Medical Center*, 295 NLRB at 490.

B. Lieutenants were not Section 2(11) Supervisors by Lieutenant Boza's Provision of Input during a Single Hiring Decision

The Regional Director was correct and not clearly erroneous in finding "a lieutenant's role on the Employer's hiring boards, which has only occurred on a single instance by a single lieutenant to date, is merely advisory, and is insufficient to establish that lieutenants have authority to hire or effectively recommend the hire of employees." DDE at 34. The Employer alleges that Lieutenant Borza provided Project Manager Scott decisive input into the decision to not hire a candidate.

The Regional Director correctly noted that the decision to not hire a candidate is different from the statutorily required decision *to hire*. DDE at 34. Hiring entails a substantial financial undertaking for the Employer, the decision not to hire, just the opposite.

The Regional Director also rejected testimony that, as a matter fact, Lieutenant Borza did have hiring authority. The Regional Director did so because he correctly found that Attorney Seleman's questioning on this point was leading. The testimony at issue is as follows:

> **Seleman:** Did Lieutenant Boza ever have a different opinion than you regarding any of the candidates?
> **Scott:** Yes. yes. We agreed on many of the candidates. There was one candidate in particular that I felt would have made a quality applicant. Lieutenant Boza did not, and he swayed me in that direction based on his evaluation of the candidate responses during the interview process.
> **Seleman:** What was the result for that candidate based on Lieutenant Boza's swaying your opinion on that?
> **Scott:** We did not hire him.
> **Selemen:** Do you believe you would have offered that person a position by for [sic] Lieutenant Boza's input?
> **Scott:** Yes.

Attorney Seleman artfully nudged Project Manager Scott from an initial position that Lieutenant Borza had at least some sway over the "direction" of Project Manager Scott's opinion to an outright statement that he essentially controlled Project Manager Scott's opinion.

In any event, it is clear from the above that it was Project Manager Scott and not Lieutenant Boza who had the authority to hire candidates. Even by the Employer's apparently best evidence in this area, it was the swaying of the opinion of Scott that mattered, not the swaying of Lieutenant Boza's opinion. But, the latter would have had to have been what mattered in order to find Section 2(11) authority to hire status.

The Board has so found in similar circumstances. *See Ryder Truck Rental*, 326 NLRB 1386, 1387 n.9 (1998)("Where [high ranking] supervisors participate in the interview process, it cannot be said that the employees whose status is at issue have authority to effectively recommend hiring within the meaning of Section 2(11)."), *citing Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989); *See also , Children's Farm Home*, 324 NLRB 61, 64 (1997)(evidence does not support conclusion that team leaders effectively recommend hiring where their role in the process is limited to participating in recommendations arrived at by the consensus of the panel as a whole).

Moreover, the tables of power are not turned by the mere fact that on one occasion a lieutenant provided information that was the but-for cause of a hiring decision. If this were true, the number of individuals with the power to hire would be virtually limitless and would include every party providing material information to hiring decisions. The discretionary authority to hire requires much more than this.

Assuming arguendo that Lieutenants did have discretionary hiring authority, such authority is insufficient to establish Section 2(11) status, because it constitutes at most an insubstantial part Lieutenant job duties. The Board has found supervisory duties insubstantial where they take up five percent of less of employees' work time. *See, e.g., Chevron, U.S.A.*, 309 NLRB 59 (1992); *Shaw, Inc.*, 350 N.L.R.B. 354 (2007); *See also Regional Director's Decision* 21-RC-21-21060, (2008) ("[Employee's] recent single experience on a hiring panel also fails to establish supervisory status, given that there is no evidence that he specifically recommended or effectively recommended an applicant for hire.")

For this reason, the Regional Director's decision was not clearly erroneous by "placing some numerological [sic] threshold on the Employer that does not exist." Request at 48. A *numerical* threshold does exist to the extent that involvement with the hiring of a certain number of employees or fewer translates into less than five percent of work time spent exercising hiring functions. By any measure, Lieutenant Boza's involvement with the hiring decision concerning one candidate falls short of the five percent minimum.

C. Lieutenants were not Section 2(11) Supervisors by Involvement in Highly Infrequent "Force to Force" Drills

The Regional Director correctly found that Lieutenants' participation in Force to Force Drills does not involve either assigning tasks or responsibly directing employees, that such putative

assignment and directions do not involve the exercise of independent judgment, and that in any event such tasks are insufficiently frequent to warrant a Section 2(11) finding.

Consistent with the Board's *Oakwood Nursing* decision, the Regional Director correctly held that the assignment of "discrete tasks in the context of training exercises held only occasionally [Force on Force Drills] does not constitutes the exercise of supervisory authority with respect to the assignment of work. The assignment must instead affect an employee's shift, place of work or department, and overall duties." DDE at 33. The sole task that Lieutenants would assign Sergeants was to post themselves in various locations throughout the plant during a mock attack. Tr. 78-81. Posting up in a location is a discrete task and it is not clearly erroneous to so hold.

Moreover, the Employer does not apparently dispute that discrete tasks are in fact the only ones at issue in Force on Force Drill. While it stresses in its brief that the Force on Force Drills involve the assignment of tasks that could arise in "potentially life-or-death situations," that does not preclude them from being discrete. Request at 39-40.

Finally, the Regional Director also correctly held that even assuming the Force on Force Drills do involve assignment and responsible direction, these supervisory tasks are exercised with insufficient frequency to support a finding of Section 2(11) status. DDE at 33.

Lieutenants engage in Force on Force Drills at most a handful of days a year. Assuming that each day of Force on Force Drills entails a full, twelve-hour workday of training, Lieutenants still spend fewer than 5% of their workdays in Force on Force Drills. Accordingly, Force on Force Drills are insufficiently frequent to warrant a finding of substantial performance of supervisory tasks, required under longstanding Board authority. *See Chevron, U.S.A.*, supra; *Shaw, Inc.*, supra.

The Employer appears to misunderstand this point of law by its statement that "[t]he issue is where the putative superior has the authority is question, not the frequency with which that authority must be exercised." Request at 39. Frequency clearly does matter under Board authority.

D. Lieutenants were not Section 2(11) supervisors by Involvement in Shift Assignments and/or Swaps, nor did they Responsibly Direct Security Officers

The Regional Director also correctly concluded that Lieutenants do not possess 2(11) status by their assignment of security officers to posts or their involvement IN "swaps" of employee posts.

To reach this conclusion, the Regional Director relied in part on the Board's decision in *G4S Government Solutions* 363 NLRB 113 (2016) which found a lack of independent judgement in the assignment of security officers to posts by Lieutenants "employed at a different nuclear power facility by an entity that is apparently related to the Employer herein." DDE at 32. The Regional Director further stated that assignment to posts was "based primarily on the collective-bargaining agreement." *Id.* In *Oakwood Nursing*, the Board expressly stated that assignments that are "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement."348 NLRB at 693. Accordingly, the Regional Director relied upon clearly applicable extant Board authority in reaching his decision. It is not clearly erroneous to so rely.

Swapping posts during a shift was, likewise, as explained by the Regional Director, not a function of Lieutenants' independent judgement, but in the vast majority of cases, accommodating the preferences of security officers. DDE at 33.

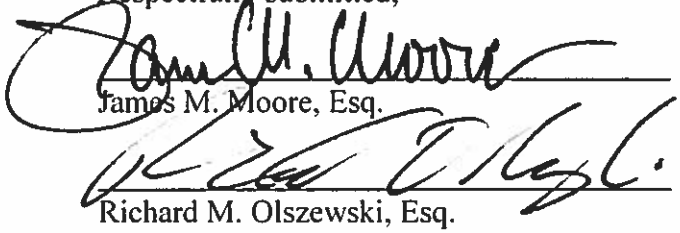
Finally, the Regional Director also correctly found that the sole incident allegedly showing responsible direction was not, in fact, one. The Regional Director consulted the record to determine that the discipline was not for the conduct of the security officer, but the Lieutenant's own failure to secure a padlock. DDE at 34. There is no clear error.

CONCLUSION

For the forestated reasons, the Board should reject the Employer's Request for Review as non-compliant with Board Rule 102.67.

The Board should also decline the Employer's Request for Review because the Regional Director's decision was not correct and not clearly erroneous. The Employer failed to show at hearing by a preponderance of detailed and specific evidence that Lieutenants possess Section 2(11) supervisory status.

Respectfully submitted,



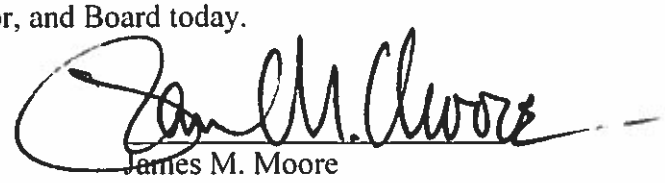
James M. Moore, Esq.

Richard M. Olszewski, Esq.
Gregory, Moore, Jeakle & Brooks, p.c.
65 Cadillac Square Suite 3727
Detroit, MI 48226
313.964.5600

Dated: December 5, 2017

Certificate of Service

I certify that I have electronically served a copy of this document upon Fred Seleman, counsel for the Employer, the Regional Director, and Board today.



James M. Moore
December 5, 2017